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1 Thomas T. Chan (SBN 129606)  
2 tchan@foxrothschild.com  
3 Lena N. Bacani (SBN 213556)  
4 lbacani@foxrothschild.com  
5 Fox Rothschild LLP  
6 1055 West Seventh Street, Suite 1880  
7 Los Angeles, California 90017  
8 Telephone: 213-624-6560  
9 Facsimile: 310-556-9828

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CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

BY \_\_\_\_\_

10  
11 Attorneys for Defendants  
12 Botin Jeanswear Trading, Inc.  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

L.A. IDOL FASHION, INC. a California  
corporation,

Plaintiff,

v.

BOTIN JEANSWEAR TRADING, INC.,  
California corporation; BOTIN  
JEANSWEAR TRADING, INC. a  
California corporation, d/b/a Botin Jeans,  
Does 1-50, inclusive

Defendants

Case No. **CV12-10308-JAK**  
(mrw)

Assigned to Hon.  
Court Room:

**DEFENDANT BOTIN'S NOTICE OF  
REMOVAL OF ACTION UNDER 28  
U.S.C. §§ 1331 AND 1338**

[Filed concurrently with Declaration of  
Lena N. Bacani, Certification of  
Interested Parties, and Notice of Related  
Cases]

NOTICE OF REMOVAL

LAI 261184v1 11/30/12

**TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

**PLEASE TAKE NOTICE** that Defendant Botin Jeanswear Trading, Inc.

(“Botin”) removes to this Court the state court action described below, based on the Court’s removal jurisdiction under 28 U.S.C. § 1441 and original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338.

## I. PROCEDURAL BACKGROUND

On October 31, 2012, LA Idol filed a Complaint and an Ex Parte Application for an Order to Show Cause and a Temporary Restraining Order against Botin. The Complaint alleged five causes of action: 1) Misappropriation of Ideas; 2) Intentional Interference with Economic Relations; 3) Negligent Interference with Economic Relations; 4) Unfair Competition and Deceptive Trade Under Cal. Bus. & Prof. Code § 17200, *et seq.*; and 5) Common Law Unfair Competition. A copy of the Complaint is attached as **Exhibit A** to the Declaration of Lena N. Bacani (“Bacani Declaration”).

Plaintiff alleges in its Complaint that it has “acquired and maintained a copyright” for the “Back Pocket Designs Mexico 2010-2011” and attached LA Idol’s copyright application as Ex. 1 to the Complaint. *See id.* at Ex. 1.<sup>1</sup> Plaintiff registered a copyright entitled “Back Pocket Designs Mexico 2010-2011.” Attached as **Exhibit B** to Bacani’s Declaration is a true and correct copy of LA Idol’s Copyright Registration from the United States Copyright Office Public Catalog.

As support for each of its causes of action, Plaintiff asserts that Botin has “copied” or “wrongfully used LA Idol’s Copyrighted Designs.” *See id.* at ¶¶ 33, 39, 49, 51, 57, 63. Plaintiff also seeks injunctive relief to enjoin Botin from “reproducing, ... any pair of denim jeans or similar denim products, related to LA Idol’s Copyrighted

<sup>1</sup> Plaintiff's copyright registration appears, on its face to be invalid for several reasons: (1) the 2010 creation date listed on LA Idol's copyright application and Copyright Registration contradicts the creation dates listed for numerous of the design photographs attached to the copyright application, which are dated in 2011; (2) the printed materials accompanying LA Idol's copyright application show twenty-two designs and name several "authors" below each pocket photograph, none of which are LA Idol; and (3) LA Idol's copyright application fails to disclose any preexisting material. *See id* at Ex. 1.

1 Design.” *See id.* at B(1). Despite the fact that all of Plaintiff’s causes of action are  
 2 based on Botin’s alleged copying of LA Idol’s “Copyrighted Designs,” Plaintiff fails to  
 3 assert a cause of action for copyright infringement. *See id.*

4 In addition to its LA Idol Complaint, LA Idol filed an Ex Parte Application for  
 5 TRO and OSC (hereafter “Ex Parte Application”) on October 31, 2012. *See* Bacani  
 6 Decl. at **Exh. C.** LA Idol failed to serve Botin with notice of the temporary restraining  
 7 order hearing set for November 2, 2012 in Department 86. As a result, Botin did not  
 8 attend the TRO hearing and was unable to defend itself against LA Idol’s requested  
 9 injunctive relief, which was granted by Judge Ann Jones on November 2, 2012. A true  
 10 and correct copy of the Temporary Restraining Order is attached to the Bacani  
 11 Declaration as **Exhibit D.**

12 Botin subsequently filed its Opposition to Plaintiff’s Ex Parte Application for a  
 13 TRO and an Order to Show Cause regarding a Preliminary Injunction. *See id.* at **Exh.**  
 14 **E.** Plaintiff filed its Reply. *See id.* at **Exh. F.** The Temporary Restraining Order was  
 15 subsequently vacated without prejudice by Judge Jones on November 21, 2012 due to  
 16 LA Idol’s failure to provide notice to Botin of the TRO hearing.

17 This Notice of Removal is timely because it is being filed and served within  
 18 thirty (30) days from the date Defendant Botin received a copy of Plaintiff’s  
 19 Complaint.

20 **II. THIS COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION  
 21 UNDER 28 U.S.C. §§ 1331 AND 1338 BECAUSE ALL OF PLAINTIFF’S  
 22 CLAIMS ARISE OUT OF BOTIN’S ALLEGED ACTS OF COPYRIGHT  
 23 INFRINGEMENT**

24 “Except as otherwise expressly provided by Act of Congress, any civil action  
 25 brought in a State court of which the district courts of the United States have original  
 26 jurisdiction, may be removed by the defendant or the defendants, to the district court of  
 27 the United States for the district and division embracing the place where such action is  
 28

1 pending.” 28 U.S.C. § 1441. Furthermore, if a civil action includes: “(A) a claim  
 2 arising under the Constitution, laws, or treaties of the United States (within the  
 3 meaning of section 1331 of this title), and (B) a claim not within the original or  
 4 supplemental jurisdiction of the district court....the entire action may be removed if the  
 5 action would be removable without the inclusion of the claim described in  
 6 subparagraph (B).” *Id.* at (c).

7 The essence of all of Plaintiff’s causes of action is that Botin took and used  
 8 Plaintiff’s “Back Pocket Design Mexico 2010-2011” (“Accused Designs”) without  
 9 compensating Plaintiff. Yet Plaintiff does not allege copyright infringement, instead  
 10 pleading “misappropriation of ideas,” “interference with economic relations,” and  
 11 “unfair competition” in a transparent attempt to avoid exclusive federal jurisdiction and  
 12 to impermissibly broaden the narrow scope of protection allowed for its Accused  
 13 Designs.

14 Although a complaint may not state a Copyright Act claim on its face, the claim  
 15 is subject to exclusive federal jurisdiction if its resolution depends on the application of  
 16 the Copyright Act. *Just-Med, Inc. v. Byce*, 600 F.3d 1118, 1124 (9<sup>th</sup> Cir. 2010); 28  
 17 U.S.C. § 1338(a) (“No State court shall have jurisdiction over any claim for relief  
 18 arising under any Act of Congress relating to patents, plant variety protection, or  
 19 copyrights.”). “[U]nder the artful pleading rule ‘a plaintiff may not defeat removal by  
 20 omitting to plead necessary federal questions in a complaint.’” *Id.*, citing *ARCO Env'l.*  
 21 *Remediation, LLC v. Dept. of Health and Env'l. Quality of the State of Mont.*, 213 F.3d  
 22 1108, 1114 (9<sup>th</sup> Cir. 2000), *Franchise Tax Bd. of Cal. V. Constr. Laborers Vacation*  
 23 *Trust for S. Cal.*, 463 U.S. 1, 22, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *see also*  
 24 *Nimmer*, § 12.01[A][1][d][I] (“[A] plaintiff may not defeat federal court jurisdiction  
 25 through the simple expedient of artfully pleading around necessary federal  
 26 questions.”).

1           Here, Plaintiff has based every cause of action on Botin’s alleged copying of  
 2 Plaintiff’s designs as follows:

3           1.       As support for its misappropriation claim, Plaintiff asserts that Botin has  
 4       “copied LA Idol’s jean designs that LA Idol has spent substantial amounts of money  
 5       creating.” *See* Complaint at ¶ 33 (emphasis added).

6           2.       As support for its Intentional Interference with Economic Relations claim,  
 7       Plaintiff asserts that Botin has “wrongfully used LA Idol’s Copyrighted Designs to sell  
 8       inferior quality jeans for less than half the cost of true LA Ido[sic] jeans for the express  
 9       purpose of interfering with LA Idol’s contractual relationships with its Mexican  
 10      customers and driving LA Idol out of business.” *See id.* at ¶ 39 (emphasis added).

11           3.       As support for its Negligent Interference with Economic Relations claim,  
 12      Plaintiff asserts that Botin’s “wanton and willful use of LA Idol’s Copyrighted  
 13      Designs” and “direct targeting of competitors of LA Idol’s Mexican customers”  
 14      breaches Botin’s “duty to comply with California and Federal laws.” *See id.* at ¶¶ 49,  
 15      51 (emphasis added).

16           4.       As support for its Unfair Competition and Deceptive Trade Practices  
 17      claim under Cal. Bus. & Prof. Code § 17200, *et seq.*, Plaintiff asserts Botin  
 18      “intentionally targeted competitors of LA Idol’s Mexican customers to sell its cheap  
 19      and poor quality jeans bearing LA Idol’s Copyrighted Designs.” *See id.* at ¶ 57  
 20      (emphasis added).

21           5.       As support for its Common Law Unfair Competition claim, Plaintiff  
 22      asserts that Botin “[t]hrough duplicating LA Idol’s Copyrighted Designs” and “then  
 23      targeting and selling the inferior jeans for less than half the price,” has unfairly  
 24      competed with LA Idol. *See* Ex. 2 at ¶ 63 (emphasis added).

25           Because all of Plaintiff’s claims for relief depend on a finding that Botin copied,  
 26      or otherwise infringed, LA Idol’s accused designs, they are subject to exclusive federal  
 27      jurisdiction under 28 U.S.C. §§1331 and 1338.

1                   **A. Misappropriation of Ideas**

2                   In effect, Plaintiff is attempting to do an “end run” around the restrictions of the  
 3 Copyright Act by pleading common law and state causes of action. However, there  
 4 can be no cause of action at common law for misappropriation of ideas where the  
 5 “idea” is a design protectable by copyright, as recognizing such a claim would  
 6 undermine the objective of Congress to afford exclusive federal jurisdiction as to what  
 7 is, and is not, protectable by copyright. *See American Economy Ins. Co. v. Reboans, Inc.* 852 F.Supp. 875, 881 (N.D. Cal. 1994). Moreover, there is no protection for  
 8 ideas, only the expression of ideas as recognized by copyright, patent and trademark.  
 9 *See Desny v. Wilder*, 46 Cal.2d 715, 732, 299 P.2d 257, 110 U.S.P.Q. 433 (1956) (“it is  
 10 clear that California does not now accord individual property type protection to  
 11 abstract ideas.”).

12                   Furthermore, as a general rule, clothing, as a “useful article,” is not  
 13 copyrightable. *See* 17 U.S.C. § 101; *In Whimsicality, Inc. v. Rubie’s Costume Co., Inc.*, 891 F.2d 452, 13 U.S.P.Q.2d 1296 (2<sup>nd</sup> Cir. 1989) (“Copyright Office considers  
 14 costumes to be clothing, which are ‘useful articles’ and by statute not copyrightable.”).

15                   Therefore, even if Plaintiff has a valid copyright in its Accused Designs, which  
 16 Botin disputes, it is unlikely that Plaintiff’s copyright registration extends to cover  
 17 Botin’s jeans. As a general rule “[e]ven where drawings or photographs of garments  
 18 are protected by copyright, the garments themselves have long been considered ‘useful  
 19 articles’ by the U.S. federal courts” and “[b]ecause the Copyright Act excludes ‘useful  
 20 articles’ from federally copyrightable subject matter, 17 U.S.C. § 101, clothing –  
 21 ‘useful’ insofar as it covers the body for reasons of warmth or social norms – generally  
 22 receives no protection under copyright law.” Charles Coleman, NAVIGATING FASHION  
 23 LAW, 2012 WL 167352 at \*3 (Jan. 2012), *citing* 17 U.S.C. § 101, *Chosun Int’l v.*  
 24 *Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005).

1                   **B. Intentional Interference with Economic Relations**

2                   Similarly, to prevail on its claim of intentional interference with economic  
 3 relations, Plaintiff has the burden of proving that Botin intentionally and wrongfully  
 4 interfered with its prospective contractual relationship with customers. To qualify as  
 5 wrongful, the interfering conduct must be independently actionable, (i.e, wrongful  
 6 apart from the fact of the interference itself). *See PMC, Inc. v. Saban Entertainment,*  
 7 *Inc.*, 45 Cal.App.4<sup>th</sup> 579 (1996); *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla*  
 8 *Village Square Venture Partners*, 52 Cal.App.4<sup>th</sup> 867, 881, 60 Cal.Rptr.2d 830 (1997)  
 9 (“Since the crux of the competition privilege is that one can interfere with a  
 10 competitor's prospective contractual relationship with a third party as long as the  
 11 interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of  
 12 the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such  
 13 wrongful conduct in order to recover for intentional interference with prospective  
 14 economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's  
 15 burden to prove, as an element of the cause of action itself, that the defendants'  
 16 conduct was independently wrongful and, therefore, was not privileged rather than the  
 17 defendants' burden to prove, as an affirmative defense, that it's [sic] conduct was not  
 18 independently wrongful and therefore was privileged.”).

19                   Plaintiff alleges that “Defendant[s] wrongfully used LA Idol's Accused  
 20 Designs...for the express purpose of interfering with LA Idol's contractual  
 21 relationships with its Mexican customers and driving LA Idol out of business.”  
 22 Complaint at ¶¶ 39, 42. As discussed above, this Court has original jurisdiction over  
 23 whether Plaintiff's Accused Designs are protectable and whether Botin's products  
 24 infringe those designs. Because Plaintiff's IIER claim depends on finding, as an  
 25 underlying harm, that Plaintiff's Accused Designs are protectable under Copyright  
 26 Law and were infringed by Botin, this Court has subject matter jurisdiction over the  
 27  
 28

1 issues governed under the Copyright Act and supplemental jurisdiction over whether  
 2 Botin intentionally interfered with Plaintiff's economic relations by selling its jeans.

3 **C. Negligent Interference with Economic Relations**

4 Because Plaintiff's NIER claim relies on the same underlying conduct – Botin's  
 5 alleged copying of Plaintiff's Accused Designs<sup>2</sup> – this Court has subject matter  
 6 jurisdiction over whether Plaintiff's designs are protectable under the Copyright Act  
 7 and whether Botin has infringed Plaintiff's copyright by selling its jeans.

8 **D. Unfair Competition and Deceptive Trade Practices (Cal. Bus. Prof.  
 9 Code § 17200) and Common Law Unfair Competition**

10 Plaintiff alleges that Defendant has “intentionally duplicated LA Idol’s  
 11 merchandise otherwise protected under California law” and “intentionally targeted  
 12 competitors of LA Idol’s Mexican customers to sell its cheap and poor quality jeans  
 13 bearing LA Idol’s Copyrighted Designs...” Complaint at ¶¶ 56, 57 (emphasis added).

14 Under California Business and Professions Code Section 17200 (the “Unfair  
 15 Competition Law”), allegations that conduct is unlawful must be predicated upon a  
 16 defendant’s purported violation of a state, federal or local law. *See Stevens v. Superior  
 17 Court*, 75 Cal. App.4<sup>th</sup> 594, 603-604 (1999). As discussed above, Plaintiff’s alleges as  
 18 the underlying unlawful conduct that Botin “intentionally duplicated LA Idol’s  
 19 merchandise.” Because Plaintiff’s unlawful competition claims depend on finding, as  
 20 an underlying harm, that Plaintiff’s Accused Designs are protectable under Copyright  
 21 Law and were infringed by Botin, this Court has subject matter jurisdiction over the  
 22 issues governed under the Copyright Act and supplemental jurisdiction over whether  
 23

26 <sup>2</sup> In support of its Negligent Interference with Economic Relations claim, Plaintiff merely concludes that if the  
 27 Court does not believe Botin’s conduct satisfies the Intentional Interference of Economic Relations claim, it  
 28 must find Negligent Interference. Complaint at ¶¶ 48 (“To the extent that said actions were not intentional in  
 the 2<sup>nd</sup> Cause of Action for Intentional Interference with Economic Relations, Defendants’[sic] conduct was at  
 the very least negligent.”).

1 Botin's sales of its jeans violate California's statutory or common law Unlawful  
2 Competition laws.

3 Because all of Plaintiff's claims for relief depend on a finding that Botin copied,  
4 or otherwise infringed, LA Idol's accused designs, they arise under the Copyright Act  
5 and are subject to this Court's original subject matter jurisdiction under 28 U.S.C.  
6 §§1331 and 1338.

7 **III. VENUE**

8 This action is currently pending in the Superior Court of California for the  
9 County of Los Angeles County and, therefore, venue in this Court is proper under 28  
10 U.S.C. § 84(c) and 28 U.S.C. § 1391(a), (b) and (d).

11 **IV. NOTIFICATIONS**

12 As required by 28 U.S.C. § 1446(d), Botin will provide prompt written notice to  
13 Plaintiff, by counsel, of removal of this action to federal court and will file a copy of  
14 this Notice of Removal with the Clerk of the Superior Court of the State of California  
15 for the County of Los Angeles.

16 **WHEREFORE**, Defendant Botin hereby removes this action from the state  
17 court to the United States District Court for the Central District of California.

18 Dated: November 30, 2012

FOX ROTHSCHILD

21 /s/ Lena Bacani

22 Thomas T. Chan (SBN 129606)  
23 Lena N. Bacani (SBN 213556)  
24 Attorneys for Defendant Botin Jeanswear  
25 Trading, Inc

**PROOF OF SERVICE**

I am over eighteen (18) years of age, employed in the County of Los Angeles, and not a party to this action. My business address is 1055 West Seventh Street, Suite 1880, Los Angeles, California 90017.

On November 30, 2012, I served the following document described as:

- 1. DEFENDANT BOTIN'S NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. §§ 1331 AND 1338; AND**
- 2. DECLARATION OF LENA N. BACANI IN SUPPORT OF BOTIN'S NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. §§ 1331 AND 1338**

[ ] **VIA FEDEX:** I caused such document to be delivered by hand to the addressee(s) at the address set forth below by FEDERAL EXPRESS.

[ ] **VIA PERSONAL SERVICE** as follows: I caused such document to be delivered by hand to the addressee(s) at the address set forth below by FIRST LEGAL MESSENGER SERVICE.

[X] **VIA MAIL:** I am readily familiar with the Firm's practice of collecting and processing correspondence for mail. Under that practice, it would be deposited with the United States Postal Service on the same day with a postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that, on the motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing shown on this proof of service.

Christopher L. Diener 18881 Von Karman Ave., 16 <sup>th</sup> Floor Irvine, CA 92612 Tel: (949) 291-9604 Fax: (949) 660-0342	Counsel for Defendant – L.A. Idol Fashion, Inc.
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I declare, under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 30, 2012, under the laws of the United States of America, at Los Angeles, California.

/Cindy Liu/

Cindy Liu